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No. 95-1345

In The

Supreme Court of the United States

October Term, 1995

RICHARD BERGER AND JO ANN BERGER,

Petitioners,

v.

THE CITY OF MORGAN HILL, CALIFORNIA, A MUNICIPAL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Sixth Appellate District

PETITIONERS' REPLY BRIEF

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I. THE BRIEF IN OPPOSITION HAS PROVIDED NO RESPONSE TO THE QUESTION PRESENTED

The California Courts held that state law claims in tort and inverse condemnation were barred by California governmental immunity under Government Code §818.8. The California Court of Appeal while at once conceding that state immunity does not apply to municipal corporations to bar a claim under 42 U.S.C. §1983 (hereinafter "§1983"), simultaneously barred the §1983 claim for failure to pursue state compensation which it likewise barred. The practical effect is to bar the §1983 claim due to state law immunity. Respondent has provided no answer or explanation for this error.

Respondent has misrepresented that the Deferred Improvement Agreement ("DIA") was imposed as part of the original subdivision approval. It was not. It arose as a separate contract subsequent to the subdivision approval modifying the imposition of offsite improvement requirements. The modification by the DIA required the immediate development of all of the offsite improvements following a separate one year deferral as opposed to installation along the frontage of each of the subdivided lots as each lot was individually developed.[1] The California Court of Appeal reasoned, in addition to the immunity bar, that the state based claims for compensation by inverse condemnation were barred because petitioners did not approach the City Council without formal

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[1] Trial Court Reporter's Transcript p.234, p.244, p.1126; Joint Appendix to the Court of Appeals pp.599 & 601.

procedure and asked to be relieved of the contract obligations, or file an action in court to set aside the contract. Both of these actions are remedial in nature as an executed recorded contract is final, and subject to no other administrative action to become a cloud on the title of the land by lien. Imposition of the remedial exhaustion requirements upon the state based claims for compensation while simultaneously barring the federal §1983 claims because of the availability of state compensation is to effectively apply the exhaustion of remedial action requirement on the §1983 claims. Specifically, California is applying its doctrine of exhaustion of remedial action set forth in *Hensler v. City of Glendale*, 8 Cal.4th 1 (1994), to federal §1983 claims. Respondent provided no argument or law in response to this error.

What respondent has done is to misrepresent to this Court that these arguments and the due process claims were not preserved by being presented to the California Courts. Contrary to these misrepresentations, these issues were clearly framed to the California Courts. The complaint in the trial Court which framed the 42 U.S.C. §1983 action. It described the facts of the recordation of the DIA lien and the failure to identify the location of the sewer line. The complaint asserted under alternative theories that these actions constituted a regulatory taking and/or substantive due process violation. (Joint Appendix to the Appellate Court, pp. 63-65.)

The trial Court dismissed all of the claims except for contract as barred by state law immunity including the §1983 action. The Court of Appeal while conceding that the reasoning of the trial Court was erroneous upheld the dismissal because of the availability of the state claims

which it otherwise barred on bases not applicable to the federal claim. On Petition for Rehearing, petitioners raised the error asserted herein.

> The 'Deferred Improvement Agreement' unifying the four subdivided parcels contrary to the original subdivision approval remains recorded even today. The recordation of the DIA was done through fraud and artifice, not due process of law, and is not a regulatory taking but a physical taking done without compensation.[2]

Likewise in the petition to the California Supreme Court, the arguments were as well raised by petitioners,

> . . . The application of the statutory immunity under Government Code §818.8 is being given preference over the constitutional guarantee of compensation for takings by the government . . . Insofar as it did constitute an action covered under Government Code §818.8, such statutory immunity provision could not work to defeat the constitutional right of the Bergers to compensation for loss of their land arising out of the actions of the City and acquiring an interest in their land and directly interfering with free alienability of the remainder of the parcels.
>
> The application of this Government Code section to the whole takings concept leads to circular reasoning. The failure of the inverse condemnation action as well as other state based claims on the basis of immunity was used to demonstrate that the lack of exhaustion of state

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[2] Page 10, Petition for Rehearing in the Court of Appeals State of California Sixth Apellate District filed September 7, 1995.

> based claims which barred the federal taking claim. Thus, the statutory immunity creates the cornerstone to facilitate the City's complete confiscation of the Bergers' property without providing any compensation.[3]

Finally, respondent's attempt to malign petitioners by misstating the facts of the case. As previously stated respondent in its opposition has misrepresented the nature of petitioners' §1983 claims and the origination of the DIA agreement. Respondent boldly asserts that petitioners " . . . always knew the general location of the easement . . . " yet such assertion is clearly contradicted by the jury findings and the verdicts. The jury found that petitioners did not discover the sewer until 1989 and found the City *never* identified the location by finding them liable in negligence for not disclosing the location. (Appendix to the Petition for Certiorari, pp. 33 and 34.) The reason for these findings is that the testimony was that no map or description was ever provided to petitioners.[4]

Additionally, although the contract action is irrelevant here, it is argued in the opposition to the petition for certiorari by respondent. The jury found a contract for development concessions which when breached damaged petitioners in the amount of $5.3 million. There was no evidence that the contract was for $3,000.00. This is a rehash of the wistful argument of respondent rejected by

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[3] Petition for Review to California Supreme Court, pp.21-23, filed October 2, 1995. In addition, see generally the same petition pages pp.15-23.

[4] Reporter's Transcript from trial pp.261-262, ln.8.

the jury. There was evidence at trial that the City Council made a knowing ratification of the contract which was accepted by the trial judge but the California Court of Appeals refused to allow a retrial even though such authorization should have been implied by the general verdict.[5]

II. CONCLUSION

Petitioners have properly preserved the questions presented to this Court. The facts of the case uniquely and justifiably raise the issues to be considered. The questions presented are of great public interest and this case demonstrates the need for federal protection of private property rights against ever widening indifference to unconstitutional deprivation by municipalities.

The simplicity of the gross injustice of this case is compelling. Petitioners have been completely deprived of their property by fraud perpetrated by the respondent, City, without due process or compensation. The California Court of Appeals and the Supreme Court in their reasoning have acted as instruments to further facilitate the confiscation of petitioners' property without compensation or due process of law.

Dated: April 8, 1996

Respectfully submitted,

BURNETT, BURNETT & ALLEN

DOUGLAS B. ALLEN

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[5] See Petition for Rehearing, filed September 7, 1995, pp.2-7, and the Petition for Review filed October 7, pp.23-27.